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Supreme Court, U.S.
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No. 95-603

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH & WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST, AND OPERATING ENGINEERS TRAINING TRUST,
Petitioners,

vs.

INSURANCE COMPANY OF THE WEST,
Respondent.

On Petition For Writ Of Certiorari To The Court of Appeal, Second Appellate District, Division Three, Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether an action created by state law that allowed a claim for plan contributions to be filed against a third party surety, on a bond that did not name Petitioner as a beneficiary, has been pre-empted by ERISA?

There are no parent or nonwholly owned subsidiaries of Respondent.

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To the Honorable Justices of the Supreme Court

Respondent respectfully requests the Court deny the Petition for Writ of Certiorari to review the decision of the Court of Appeal of the State of California filed May 25, 1995, reproduced in the Appendix to the Petition.

Summary of Argument

No issues raised by this case warrant further consideration by this Court. This Court has previously examined the legislative history of and ruled upon the extent of the pre-emption clause of ERISA in several opinions, and has concluded that the Congress intended the pre-emption language to be deliberately expansive, and to establish pension plan regulation as exclusively a federal concern, with a uniform body of law.

The decision of the Court below is consistent with decisions of the United States Court of Appeal, Ninth Circuit, and the California Supreme Court in cases where this Court denied previous petitions for writs of certiorari.

The Petitioners are not even within the class of third party beneficiaries identified by the bonds in question who could assert a claim on these bonds. Only through application of a special provision in California law that allowed union-sponsored employee benefit plans to assert claims on these bonds could Petitioners maintain such claims. The California Supreme Court held such provisions have been pre-empted by ERISA and this Court denied a petition for a writ of certiorari.

The Petitioners now seek to avoid the result of those cases by claiming that they are the intended beneficiaries of the bonds and applying another California statute that would give them rights against the third party surety.

The right given by state law to collect contributions from third party sureties was unique to union-sponsored plans for the construction trades. No other employee benefit plans enjoyed such rights, nor were such rights available to union plans in all states. The pre-emption of such state-created causes

of action is consistent with the purpose of ERISA to create a uniform body of law.

I. This Court's Published Decisions Adequately Address the Pre-Emption Issue.

This Court has said of the pre-emption clause in § 514(a) of ERISA [29 U.S.C. § 1144(a)] that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulations as exclusively a federal concern.'" *Pilot Life Insurance Co. vs. Dedeaux*, 481 U.S. 41, 45 (1986). The Court noted the "expansive sweep of the pre-emption clause" (*Id.* at p. 47) and "emphasized that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'" (*Id.* at p. 47-48). Common law causes of action that "relate to" employee benefit plans are expressly pre-empted. (*Id.* at p. 47, 48) [Citing *Shaw vs. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Metropolitan Life Ins. Co. vs. Massachusetts*, 471 U.S. 724 (1985).]

II. The "Conflicting Decisions" Cited by Petitioner Are Distinguishable or Invalidated by This Court's Published Opinions.

It is not necessary for this Court to review this case based on the illusory conflicts raised by Petitioner. The cases cited by Petitioner can be limited to their facts, are distinguishable, and their failure to follow this Court's analysis is readily apparent.

Sasso vs. Vachris, 66 N.Y.2d 28 (1985), is cited by Petitioner as an example of a conflicting decision. This conflict is more illusory that real. *Sasso* was decided in 1985, before this Court had explained that pre-emption was not limited to state laws specifically designed to affect employee benefit plans,

and that state laws "relate to" a benefit plan and are pre-empted if they have a connection with or reference to a plan. *Pilot Life Ins. Co. vs. Dedeaux*, 481 U.S. 41 (1987). Under the broad common sense meaning, a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Ingersoll-Rand Co. vs. McClendon*, 498 U.S. 133, 140 (1990).

Sasso was disregarded by the Federal Court in *Romney vs. Lin*, 894 F.Supp. 163 (DC, So. Dist. N.Y. 1995). The District Court observed that *Sasso* was based on the reasoning in *Renaldo vs. Cuomo*, 79 F.2d 133 (2d Cir. 1984), which was rejected by this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). The District Court concluded that N.Y. Bus. Corp. Law § 630 was pre-empted. This is the same statute that *Sasso* held was not pre-empted.

Sasso was criticized in *Local Union 598, etc. vs. J.A. Jones Const. Co.*, 846 F.2d 1213, 1219 fn.8 (9th Cir. Wash. 1988).

Petitioners also cite *Ragan vs. Tri-County Excavating, Inc.*, 62 F.3d 501 (3rd Cir. Pa. 1995) as a conflicting decision. This decision is also based upon the notion that a law "relates to" an employee benefit plan only "if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan." *Ragan, supra*, 63 F.3d at 510-511, citing its own prior opinion in *United Wire, Metal and Machine Health and Welfare Fund vs. Morristown Memorial Hospital*, 995 F.2d 1179, 1192 (3d Cir. N.J. 1993), cert. denied _____ U.S. _____, 114 S.Ct. 382, 126 L.Ed.2d 332 (1993).

The Third Circuit "assumes" that the union "is proceeding at common law as third-party beneficiary of the surety bond." *Ragan*, *supra*, 62 F.3d at 511. Since the terms of the bond are not quoted in the opinion, it is unclear how the union became a third party beneficiary. It is apparent that the bonds were for private works and apparently there were no statutory requirements. If the bond in question specifically named the union or its trust fund as a beneficiary without resort to state law, then the case is factually different from this case. Here, the Petitioners are not parties to the bonds, and will have no claim in them in the absence of some state law creating such a cause of action especially for a union administered employee benefit plan.

The Third Circuit ignores all those portions of this Court's decisions in *Pilot Life*, *supra*, and *Ingersoll-Rand*, *supra*, that emphasize the breadth of the pre-emption clause of ERISA and the "broad common-sense meaning" of the phrase "relate to," as used in ERISA § 514(a).

III. The Petitioning Union Trust Funds Can Not Maintain An Action Against The Third Party Surety Without Invoking Their Special Status As Employee Benefit Plans.

Union employee benefit plans were given special status by California law as claimants able to file mechanic's liens, stop notices, and bond claims on construction projects. California Civil Code § 3111. This statute was held pre-empted in *Carpenters So. Cal. Admin. Corp. vs. El Capitan Development Co.*, 53 Cal.3d 1041 (1991), cert. denied 502 U.S. 963 (1991).

The union employee plans described in § 3111 were granted rights on private construction bonds by § 3226 which

specifically granted "those persons described in Section 3110, 3111, or 3112" a right to recover on such bonds.

On public works construction projects, bonds were required by statute, § 3247, and were required by § 3248(c) to inure to the benefit persons named in § 3181, which in turn made reference to § 3111, the union plans.

Of the nine bonds that Petitioners included in their action, eight were for public works projects and were therefore required by statute to be provided and were required by statute to inure to the benefit of the union administered employee benefit plans. Contrary to Petitioners' assertion that these are "private surety bonds," (Petition, p. i, Question Presented) these are statutory bonds with statutory requirements that specifically refer to the employee benefit plans in question.

To this extent, this case differs from those cited by Petitioner as being in conflict. In *Sasso*, *supra*, and *Ragan*, *supra*, the courts concluded that no action specific to employee benefit plans had been created. If the Third Circuit applied its three part test of what "relates to" an ERISA plan to the California law, it should reach the same result as the court below.

The one private bond involved was specifically limited to persons designated in § 3110 and § 3112 of the California Civil Code, which excludes Petitioners.

California law does not allow a third party beneficiary to sue on a contract unless the contract is made expressly for his benefit. California Civil Code § 1559. Petitioners can not place themselves within the group for whose benefit the bonds were issued without invoking the statutes that specifically identify the

union benefit plans as additional persons to whom such bonds shall inure.

IV. The Intent of Congress to Create a Uniform Body of Law Would Apply Equally to Laws Effecting Contributions to Plans.

Union-sponsored employee plans in the construction trades appear to be unique in having been given rights to collect plan contributions from third parties other than the employer. The basis for that right varies among the states or may be nonexistent in some states. *See, e.g., Trustees of Elec. Wkrs. H.& W. Trust vs. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992), where a Nevada statute made the general contractor liable for subcontractors obligations. The Court of Appeal held the statute to have been pre-empted to the extent it applies to ERISA plans. The Court observes that "there seems to be no support for concluding that Congress intended to allow each state to expand liability for contributions to ERISA as it sees fit." *Marjo, supra*, 988 F.2d at 868.

The intent of § 514(a) was to ensure that plans and plan sponsors would be subject to a uniform body of benefits laws. *Ingersoll-Rand Co. vs. McClendon, supra*, 498 U.S. at 142. The continued existence of state laws that provide for plan contribution resources other than those in ERISA, and which vary from state to state and from one profession to another within a state, does not create a uniform body of law. If a uniform body of benefits law is to exist, it must be uniform in all aspects of a plan administration, both as to payment of benefits and collection of contributions.

Conclusion

This Court has already expressed its views of the Congressional intent in the pre-emption clause. The fact that Petitioners have a different interpretation of Congressional intent is not a reason for this Court to again visit that issue by granting this petition for a writ of certiorari.

The petition should be dismissed.

Respectfully submitted,

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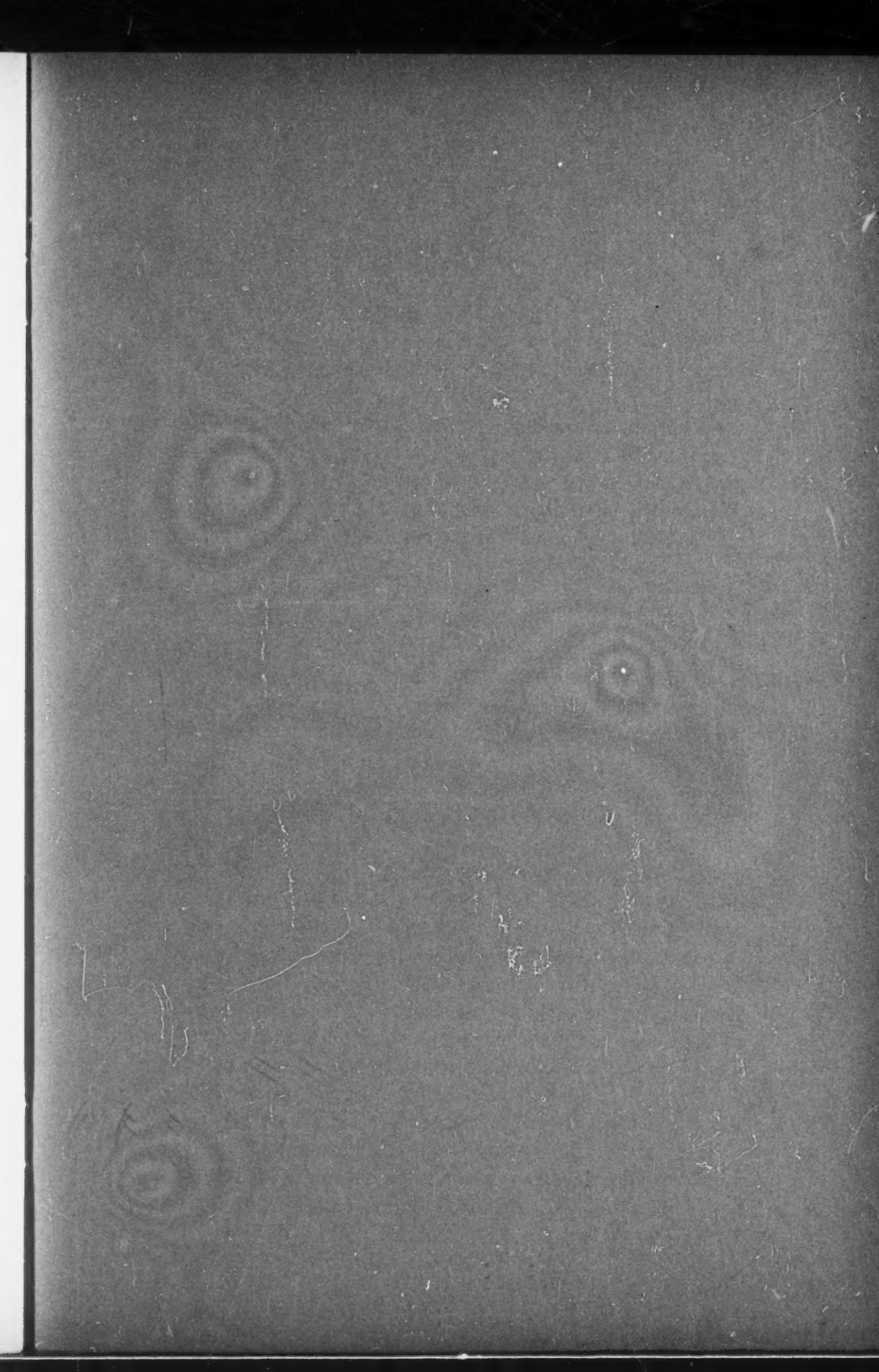

APPENDIX

Statutes Involved

I. ERISA, Section 514(a), 29 U.S.C. § 1144(a)

Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975 ....

II. California Civil Code § 1559

Sec. 1559. Third-party beneficiary contract. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

III. California Civil Code § 3110

Sec. 3110. Persons entitled to lien. Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances or leased equipment for the value of such labor done or furnished at the instance of the owner or of any person acting by his authority or under him as a contractor or otherwise. For the

purposes of this chapter, every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner.

IV. California Civil Code § 3111

Sec. 3111. Payments to express trust fund established pursuant to collective bargaining agreement. For the purposes of this chapter, an express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement.

V. California Civil Code § 3112

Sec. 3112. Site improvement lien. Any claimant who, at the instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise) of any lot or tract of land, has made any site improvement has a lien upon such lot or tract of land for work done or materials furnished.

VI. California Civil Code § 3181

Sec. 3181. Persons other than original contractor. Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

VII. California Civil Code § 3226

Sec. 3226. Construction of bonds given pursuant to title. Any bond given pursuant to the provisions of this title will be construed most strongly against the surety and in favor of all persons for whose benefit such bond is given, and under no circumstances shall a surety be released from liability to those for whose benefit such bond has been given, by reason of any breach of contract between the owner and original contractor or on the part of any obligee named in such bond, but the sole conditions of recovery shall be that claimant is a person described in Section 3110, 3111, or 3112, and has not been paid the full amount of his claim.

VIII. California Civil Code § 3247

Sec. 3247. Filing of payment bond for public work involving expenditures of over $25,000.

(a) Every original contractor to whom is awarded a contract by a public entity, except as provided in subdivision (d) of Section 7103 of the Public Contract Code, involving an expenditure in excess of twenty-five thousand dollars ($25,000) for any public work shall, before entering upon the performance of the work, file a payment bond with and approved by the officer or public entity by whom the contract was awarded.

A public entity shall state in its call for bids for any such contract that a payment bond is required in the case of such an expenditure.

(b) A payment bond filed and approved in accordance with this section shall be sufficient to enter upon the performance of work under a duly authorized contract which supplements the contract for which such payment bond was

filed, if the requirement of a new bond is waived by the public entity.

(c) For purposes of this section, providers of architectural, engineering, and land surveying services pursuant to a contract with a public entity for any public work shall not be deemed an original contractor and shall not be required to post or file the payment bond required in subdivisions (a) and (b). This subdivision shall apply to all contracts entered into subsequent to January 1, 1971.

The amendment to this section made during the 1980 portion of the 1979-80 Regular Session of the Legislature by Chapter 293 of the Statutes of 1980, does not constitute a change in, but is declaratory of, existing law.

IX. California Civil Code § 3248(c)

Sec. 3248. Payment bond requirements. To be approved the payment bond shall satisfy all of the following requirements:

...

(c) By its terms inure to the benefit of any of the persons named in Section 3181 so as to give a right of action to such persons or their assigns in any suit brought upon the bond.